

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds that the Award entered by the Administrative Law Judge finding an increase in the functional impairment to work disability of forty-four percent (44%) is appropriate.

Claimant injured his cervical spine on February 2, 1992 while helping a co-worker lift a cabinet. Dr. Paul Stein treated claimant's injury and performed a surgical fusion on May 1, 1992. Claimant returned to work after surgery in September 1992 with work restrictions. When claimant returned to work, he was no longer able to work as a painter and worked, instead, as a bench assembler. In January 1993, claimant settled his workers compensation claim by agreeing to a running award based on a fifteen percent (15%) functional impairment. Claimant, thereafter, experienced what he described as increased shoulder and neck pain and returned to Dr. Stein for treatment. Dr. Stein referred claimant in turn to Dr. Perlita Odulio, a board-certified physical and rehabilitation medicine specialist.

Dr. Odulio first saw claimant May 7, 1993. He recommended physical therapy and a TENS unit. He also directed performance of a functional capacity evaluation. Claimant was released to return to work at Boeing in November 1993, but was laid off November 15, 1993. Claimant has filed a new Application for Hearing alleging a new injury during the period December 1992 through January 1993. The new claim is assigned Docket Number 175,062. Claimant also filed an Application for Review and Modification of the Award in Docket Number 163,303. This Order relates to Docket Number 163,303 only.

Respondent presents alternative arguments. First, respondent argues that if claimant suffered a new injury after returning to work, payment of benefits should be the responsibility of the Workers Compensation Fund. In the alternative respondent argues if claimant suffered no additional injury, review and modification is inappropriate.

After reviewing the record, the Appeals Board agrees with the finding by the Administrative Law Judge that the claimant suffered no new injury. Four doctors testified on this question. Doctors Zimmerman and Schlachter voiced opinions that claimant did suffer a new injury after returning to work. The treating doctors, Dr. Stein and Dr. Odulio, disagreed. Both concluded claimant suffered no additional impairment. Dr. Schlachter saw claimant only twice. Although claimant was seen at Boeing Central Medical by Dr. Zimmerman on a number of occasions, the Appeals Board finds the opinions of the treating specialists better informed and more convincing.

The Appeals Board, nevertheless, considers appropriate the modifications made by the Administrative Law Judge. Claimant was laid off November 15, 1993. From the date of layoff, November 15, 1993, claimant should be entitled to work disability. Lee v. Boeing Co-Wichita, 21 Kan. App. 2d 365, 899 P.2d 516 (1995).

The forty-four percent (44%) Award was based upon the opinions of Mr. Jerry Hardin, the only vocational expert to testify. His opinions on loss of access to the open labor market and loss of ability to earn a comparable wage were given equal weight to arrive at the forty-four percent (44%) finding. Accordingly, the Appeals Board finds claimant should be entitled to a fifteen percent (15%) functional impairment pursuant to the original agreed upon Award through the date of layoff of November 15, 1993, and entitled to work disability of forty-four percent (44%) thereafter.

Claimant was paid 30.57 weeks of temporary total disability compensation at the rate of \$289.00 in Docket Number 163,303. The parties both state in their submission letters respondent paid 43 weeks at \$299.00 per week in Docket Number 175,062. Consistent with the holding in this case, the rate for those 43 weeks should have been \$289.00 per week. This Award will, therefore, be for 73.57 weeks of temporary total disability (the 30.57 weeks originally paid, plus 43 paid after the settlement) and a 15% permanent partial disability until November 15, 1993, the date claimant was laid off and a work disability of 44% thereafter, with a credit for any amounts previously paid.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl dated October 12, 1994, should be, and is hereby, modified.

**AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** the claimant, Russell Butcher, and against the respondent, The Boeing Company-Wichita, and its insurance carrier, Aetna Casualty & Surety Company, for an accidental injury which occurred February 2, 1992 and based upon an average weekly wage of \$641.80, for 73.57 weeks of temporary total disability compensation at the rate of \$289.00 per week or \$21,261.73, and 19.43 weeks at the rate of \$64.18 per week or \$1,247.02 for a 15% permanent partial general body impairment of function covering the period through November 15, 1993 and, thereafter, 322 weeks at \$188.27 per week for a 44% work disability.

As of December 29, 1995, there is due and owing 73.57 weeks of temporary total disability compensation at the rate of \$289.00 per week, followed by 19.43 weeks permanent partial at \$64.18 per week and 110.57 weeks at 44% permanent partial disability at \$188.27 per week for a total of \$43,325.76, which is ordered to be paid in one lump sum less any amounts previously paid. The previously paid amounts to be credited on this lump sum payment shall include temporary total payments previously paid, including the 43 weeks at \$299.00 per week paid on Docket Number 175,062, as well as all other temporary total or permanent partial payments previously made under either docket number. Thereafter, the remaining balance in the amount of \$39,805.93 shall be paid at \$188.27 per week until fully paid.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January 1996.

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BOARD MEMBER

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**BOARD MEMBER**

- c: James B. Zongker, Wichita, Kansas  
Frederick L. Haag, Wichita, Kansas  
Cortland Q. Clotfelter, Wichita, Kansas  
Shannon S. Krysl, Administrative Law Judge  
Philip S. Harness, Director